

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STATE OF NEW YORK,

Plaintiff,

-against-

MOUNTAIN TOBACCO COMPANY d/b/a
KING MOUNTAIN TOBACCO COMPANY INC.,

Civil Action No.

2:12-CV-06276 (JS) (SIL)

Defendant.

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DECLARATION OF CHRISTOPHER K. LEUNG IN SUPPORT OF
PLAINTIFF STATE OF NEW YORK'S MOTION FOR SUMMARY JUDGMENT
(Exhibits to be filed under Seal: Exs. 12, 16, 21, 41–50, 52–53)
(REDACTED IN PART)

I, Christopher K. Leung, declare under penalty of perjury that the following is true and correct:

1. I am an Assistant Attorney General in the New York State Office of the Attorney General, and am counsel of record for the above-captioned action. I make this declaration in support of the plaintiff State of New York's accompanying motion for summary judgment.

2. Attached as **Exhibit 1** is a true and correct copy of the State's Amended Complaint (ECF No. 96; *see id.* at ECF No. 6).

3. Attached as **Exhibit 2** is a true and correct copy of the Answer filed by defendant Mountain Tobacco Company d/b/a King Mountain Tobacco Inc. ("King Mountain") on May 9, 2013 (ECF No. 47).

4. Attached as **Exhibit 3** is a true and correct copy of The Yakama Law and Order Codes (2d CRD Ed.), Title II, which includes the "Definition of an Indian" at section 2.01.07.

5. Attached as **Exhibit 4** is a true and correct copy of (a) Stipulation for Discontinuance of Proceeding (DTA # 825886) entered into between King Mountain and the Department of Taxation and Finance on or about October 23, 2014, In the Matter of the Petition of King Mountain Tobacco Company, Inc. for Redetermination of a Deficiency/Revision of a Determination or for Refund under Article 20 of the Tax Law for the Tax Period ended December 3, 2012 (N.Y.S. Div. of Tax Appeals); and (b) an Order of Discontinuance, dated November 19, 2014, in the same matter concerning Notice / Assessment No. L-038986040.

6. Attached as **Exhibit 5** is a true and correct copy of King Mountain's Corporate Disclosure Statement (ECF No. 51).

7. Attached as **Exhibit 6** is a true and correct excerpted copy of the Surgeon General's 2014 Report, *The Health Consequences of Smoking, A Report of the Surgeon General* (U.S. Dept. of Health and Human Services). The full report is also available at SurgeonGeneral.gov, *Reports & Publications*, <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/50-years-of-progress-by-section.html>.

8. Attached as **Exhibit 7** is an excerpted true and correct excerpted copy of the 2012 Independent Evaluation Report of the New York Tobacco Control Program. A true and correct copy of the full report is available at New York State Department of Health's website, *Reports, Brochures and Fact Sheets*, https://www.health.ny.gov/prevention/tobacco_control/reports_brochures_fact-sheets.htm.

9. Attached as **Exhibit 8** is an excerpted true and correct excerpted copy of the 2011 Independent Evaluation Report of the New York Tobacco Control Program. A true and correct copy of the full report is available at New York State Department of Health's website, *Reports*,

Brochures and Fact Sheets,

https://www.health.ny.gov/prevention/tobacco_control/reports_brochures_fact-sheets.htm.

10. Attached as **Exhibit 9** is a true and correct copy of webpage maintained and updated by the New York State Department of Taxation and Finance, entitled *Cigarette and Tobacco Products Tax* (available at <http://www.tax.ny.gov/bus/cig/cigidx.htm>).

11. Attached as **Exhibit 10** is a true and correct copy of a webpage maintained and updated by the New York State Department of Taxation and Finance, entitled *New York State Licensed and Registered Cigarette Tax Agents, Wholesale Dealers and Retail Dealers List* (available at <https://www8.tax.ny.gov/CGTX/cgtxHome>).

12. Attached as **Exhibit 11** is a true and correct copy of certain documents produced by King Mountain as part of its initial disclosures (prefix bate-stamped “KMTID ____”).

13. Attached as **Exhibit 12** is a true and correct copy of certain documents produced by King Mountain in response to the State’s discovery requests (prefix bate-stamp “KMTA ____”). **(FILED UNDER SEAL.)**

14. Attached as **Exhibit 13** is a true and correct copy of State’s First Set of Interrogatories and Requests for Production of Documents (June 11, 2013).

15. Attached as **Exhibit 14** is a true and correct copy of King Mountain’s First Supplemental Response to Interrogatory No. 15 (June 5, 2014).

16. Attached as **Exhibit 15** is a true and correct copy of King Mountain’s First Supplemental Response to Plaintiff’s First Set of Interrogatories Nos. 1–7 (Oct. 15, 2013).

17. Attached as **Exhibit 16** is a true and correct copy of King Mountain’s Third Supplemental Response to Interrogatory No. 1 and First Supplemental Response to Plaintiff’s Request for Production No. 8 (Apr. 18, 2014). **(FILED UNDER SEAL.)**

18. Attached as **Exhibit 17** is a true and correct copy of King Mountain's Response to Plaintiff's Second Set of Interrogatories (Nos. 8–15) (May 9, 2014).

19. Attached as **Exhibit 18** is a true and correct copy of King Mountain's Responses to Plaintiffs' 1st Set of Requests for Admission (Nos. 1–63) (Nov. 20, 2013).

20. Attached as **Exhibit 19** is a true and correct copy of King Mountain's Responses to Plaintiff's 2nd Set of Requests for Admission (Nos. 64–118) (May 9, 2014).

21. Attached as **Exhibit 20** is a true and correct condensed copy of the deposition transcript of King Mountain's General Manager and Rule 30(b)(1) and (b)(6) witness Yancey Black (July 29, 2014).

22. Attached as **Exhibit 21** is a true and correct condensed copy of the deposition transcript of King Mountain's CEO and Rule 30(b)(1) and (b)(6) witness Jay Thompson (July 30, 2014). (**FILED UNDER SEAL.**)

23. Attached as **Exhibit 22** is a true and correct condensed copy of the deposition transcript of Delbert Wheeler, Sr. (held May 8, 2015), as well as certain letters to Wheeler's counsel (dated May 20, 2015 and May 27, 2015) making such transcript available to the witness to read and sign.

24. Attached as **Exhibit 23** is a true and correct copy of First Amended Complaint, filed by King Mountain and Wheeler in *King Mountain Tobacco Company, Inc.; Delbert Wheeler, Sr.; and the Confederated Tribes and Bands of the Yakama Indian Nation v. Alcohol and Tobacco Tax and Trade Bureau et al.*, Case No. 2:11-cv-03038-RMP (E.D. Wash.) ("*Wheeler / King Mt. v. TTB*").

25. Attached as **Exhibit 24** is a true and correct copy of the Declaration of Jamie Aburto Garcia filed in support of King Mountain and Wheeler's opposition to defendants' motion to dismiss, filed in *King Mt. et al. v. TTB*, Case No. 2:11-cv-03038-RMP (E.D. Wash.).

26. Attached as **Exhibit 25** is a true and correct copy of the Declaration of Delbert L. Wheeler, Sr. filed in support of King Mountain and Wheeler's opposition to defendants' motion to dismiss, filed in *King Mt. et al. v. TTB*, Case No. 2:11-cv-03038-RMP (E.D. Wash.) (Jan. 19, 2012).

27. Attached as **Exhibit 26** is a true and correct copy of, Order Denying King Mountain and Wheeler's motion to strike and granting in part and denying in part defendants' motion to dismiss, entered in *King Mt. et al. v. TTB*, Case No. 2:11-cv-03038-RMP (E.D. Wash.). (Sept. 24, 2012).

28. Attached as **Exhibit 27** is a true and correct copy of the Declaration of Richard "Kip" Ramsey, filed in support of King Mountain and Wheeler's opposition to plaintiffs' motion for a preliminary injunction, in the case *Philip Morris USA Inc. v. King Mountain Tobacco Company, Inc.; Delbert L. Wheeler, Sr., and Richard "Kip" Ramsey*, Case No. 2:06-cv-03073-RHW (E.D. Wash.) ("*Philip Morris v. King Mt.*") (Oct. 17, 2006).

29. Attached as **Exhibit 28** is a true and correct copy of the Declaration of William Parry, filed in support of King Mountain and Wheeler's opposition to plaintiffs' motion for a preliminary injunction, in the case *Philip Morris v. King Mt. et al.*, Case No. 2:06-cv-03073-RHW (E.D. Wash.) (Oct. 17, 2006).

30. Attached as **Exhibit 29** is a true and correct copy of the Declaration of Virgil Thomas, filed in support of King Mountain and Wheeler's opposition to plaintiffs' motion for a

preliminary injunction, in the case *Philip Morris v. King Mt.et al.*, Case No. 2:06-cv-03073-RHW (E.D. Wash.) (Oct. 17, 2006).

31. Attached as **Exhibit 30** is a true and correct copy of the Declaration of Delbert L. Wheeler, Sr., filed in support of King Mountain's opposition to plaintiffs' motion for a preliminary injunction, in the case *Philip Morris v. King Mt.et al.*, Case No. 2:06-cv-03073-RHW (E.D. Wash.) (Oct. 17, 2006).

32. Attached as **Exhibit 31** is a true and correct copy of a webpage maintained and updated by defendant King Mountain, <http://www.kingmountaintobacco.com/>.

33. Attached as **Exhibit 32** is a true and correct copy of a partial interview transcript given by defendant Delbert Wheeler, Sr., to IndianCountryTV.com correspondent, Kimberlie Acosta. A full copy of the referenced interview is available on YouTube, Chasing The American Dream: Delbert Wheeler—Standing by Yakama's 1855 Treaty, available at <https://www.youtube.com/watch?v=-aHduZ3IcNo> (published May 30, 2012) (last accessed Dec. 23, 2015). In Wheeler's interview to IndianCountryTv.com (at 20:46–21:00), Wheeler states the following: "Delbert Wheeler says I decide that I read my treaty, and in my treaty, it states that I'm untaxable, so I'm not going to pay this tax."

34. Attached as **Exhibit 33** is a true and correct copy of the Declaration of Peter Spitzer, dated February 21, 2013 (ECF No. 16).

35. Attached as **Exhibit 34** is a true and correct copy of the Declaration of Peter Spitzer, dated October 15, 2015 (served Oct. 19, 2015).

36. Attached as **Exhibit 35** is a true and correct copy of the Complaint, filed in *City of New York v. King Mountain*, Case No. 2:10-cv-05783 (LDW)(AKT) (E.D.N.Y.) (Dec. 14, 2010).

37. Attached as **Exhibit 36** is a true and correct copy of Stipulated Consent Order, filed in *City of New York v. King Mountain*, Case No. 2:10-cv-05783 (LDW)(AKT) (E.D.N.Y.) (Jan. 18, 2012).

38. Attached as **Exhibit 37** is a true and correct copy of certain documents produced by the State, date-stamped NY 3–4.

39. Attached as **Exhibit 38** is a true and correct copy of a webpage maintained and updated by the New York State Department of State, concerning Valvo Candies and certain information that the company has reported to the State (*see* entity search results for Valvo Candies, available at https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=318792&p_corpid=271406&p_entity_name=valvo%20candies&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0).

40. Attached as **Exhibit 39** is a true and correct copy of a webpage maintained and updated by the Chautauqua County Department of Finance, concerning the property upon which Valvo Candies operates its business on (available at <http://app.co.chautauqua.ny.us/cctaxonline/#view/064689-32.00-1-24/overview>).

41. Attached as **Exhibit 40** is a true and correct copy of a webpage taken from Valvo's Candies' website, <http://www.valvoscandy.com/index.html> (last visited Dec. 20, 2015).

42. Attached as **Exhibit 41** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]

[REDACTED]. (FILED UNDER SEAL.)

43. Attached as **Exhibit 42** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]. (FILED UNDER SEAL.)

44. Attached as **Exhibit 43** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]. (FILED UNDER SEAL.)

45. Attached as **Exhibit 44** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]. (FILED UNDER SEAL.)

46. Attached as **Exhibit 45** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]. (FILED UNDER SEAL.)

47. Attached as **Exhibit 46** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]. (FILED UNDER SEAL.)

48. Attached as **Exhibit 47** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its

New York customer / distributor [REDACTED]

[REDACTED]. (FILED UNDER SEAL.)

49. Attached as **Exhibit 48** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]

[REDACTED]. (FILED UNDER SEAL.)

50. Attached as **Exhibit 49** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]

[REDACTED]. (FILED UNDER SEAL.)

51. Attached as **Exhibit 50** is a true and correct copy of the sales invoices and associated delivery documents concerning King Mountain's sale and delivery of cigarettes to its New York customer / distributor [REDACTED]

[REDACTED]. (FILED UNDER SEAL.)

52. Attached as **Exhibit 51** is an excerpted true and correct excerpted copy of the 2013 Independent Evaluation Report of the New York Tobacco Control Program. A true and correct copy of the full report is available at New York State Department of Health's website, *Reports, Brochures and Fact Sheets*, https://www.health.ny.gov/prevention/tobacco_control/reports_brochures_fact-sheets.htm.

53. Attached as **Exhibit 52** is a true and correct copy of the State's 56.1 Statement served on King Mountain on July 30, 2015. (FILED UNDER SEAL.)

54. Attached as **Exhibit 53** is a true and correct copy of King Mountain's Counterstatement to the State's 56.1 Statement, dated September 11, 2015. (**FILED UNDER SEAL.**)

55. Attached as **Exhibit 54** is a true and correct copy of an email from King Mountain counsel Kelli Keegan, dated May 4, 2015.

Dated: New York, New York
January 29, 2016

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: /s/ Christopher K. Leung

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